

Delaware Chancery Court Hears Cheers and Critiques at Columbia

Corporate Counsel

By Catherine Dunn

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It's not every day that law professors get to tell the members of the country's premier business court—the Delaware Court of Chancery—what their academic research reveals about the bench's decision-making. In early November, however, academics, attorneys, and the court's chancellor and four vice chancellors gathered for just this purpose at Columbia University Law School in New York City.

The meeting had a deep back-story. In 1974, Columbia professor and vocal chancery critic William Cary said that the state court, established in 1792, was promoting a jurisprudential "race to the bottom." So, standing at a lecture hall podium in Jerome Greene Hall, before the court and an array of plaintiffs' and defense attorneys, Columbia professor and event emcee John Coffee pronounced 11/11/11 "the ultimate armistice day"—a day to "build bridges" between the bar and academia, and "to declare the end to a cold war."

Thus the stage was set for a day full of accolades, advice, hypotheses—and a couple of heated exchanges—before the men who shape a good deal of American corporate law via their rulings on takeovers, fiduciary duties, and other business matters. According to the academic literature, close to three-fifths of U.S. public companies incorporate in Delaware, providing the court with a large case flow upon which their expertise is based.

In fact, said Harvard Law professor Mark Roe, U.S. corporate law is essentially made in two places: Washington, D.C.—with a mix of public policymakers, consumers, employees, unions, managers, and investors influencing the feds—and Delaware, where a smaller circle of parties (managers, boards, and investors) influences the chancery. Roe also remarked that Delaware's own influence on Washington action is "underplayed" in the understanding of U.S. corporate law.

One of the many practitioners in the lecture hall—William Savitt, a partner at event co-sponsor Wachtell, Lipton, Rosen & Katz—particularly piqued the audience's interest with his hypothesis: that the court functions, in some ways, like a regulator. This "truly expert group of judges," Savitt explained, sees the entire field of economic conduct in the U.S. and the "chancellors aren't shy" about making new rules of the road. This attribute of offering "prospective guidance"—combined with judges who are known for engaging with academics, practitioners, and writers in the blogosphere—functions almost like a "notice and comment procedure" that characterizes a regulatory body, said Savitt.

Savitt also pointed to research by fellow panelist Steven Davidoff, a law professor at Ohio State University, showing the skyrocketing incidents of shareholders in public companies challenging deals through litigation. A decade ago, about one in 10 such deals inspired a lawsuit; by 2010, the litigation rate spiked to 84 percent.

"It really is spectacular growth," said Savitt. "It shows no signs of slowing."

But if the chancery's market share of that litigation declines, that may jeopardize the court's widespread influence, said Northwestern University law and management professor Bernard Black, in what were perhaps the day's most provocative claims. The chancery needs to attract cases if it's to adjudicate them and maintain its high profile, he said.

"Increasingly, they don't," said Black, who ran through four different data sets to make his point. "It's losing cases."

As for why this could be, Black offered "no data, just speculation." He cited actions by the court that affect plaintiffs' attorneys—such as fee cuts and "anti-plaintiff lawyer rhetoric"—which may be prompting those lawyers to file suit in other states.

He displayed a slide quoting Vice Chancellor J. Travis Laster (who was sitting in one of the front rows, taking notes throughout the day), as saying: "a lot of these sue-on-every-deal cases are. . . worthless, they're simply we see the announcement, then we file, okay?"

"Plaintiffs' lawyers don't like judges to say these things in public," Black intoned, drawing laughs from the crowd (including from a certain vice chancellor).

After the panel, Black said: "Laster is very explicit about saying: I want the bad cases to go away." He continued, "I think subconsciously they're chasing away good cases, too, without realizing it."

Did Black's message resonate with the court? Over lunch, Chancellor Leo E. Strine, Jr. said he had heard a lot of "fiction" over the course of the morning, taking umbrage with the suggestion that the court's market share was shrinking.

"I don't believe we're losing good cases," said Strine, who in June took over as head of the court from William B. Chandler III.

At day's end, University of Pennsylvania law professor Edward Rock walked up to Laster, and greeted the vice chancellor with a jovial pat on the back. As Laster prepared to walk out of the lecture hall with Rock, he paused for a moment. A reporter asked him what he thought of the presentations. "I think it's always great to hear from the academics," he told CorpCounsel, "because they have an incentive to tell you actually how it is."